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SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. 396

HARRY KIRK CREAMER,

Petitioner,

vs.

THE OGDEN UNION RAILWAY AND DEPOT COMPANY, a Corporation,

Respondent.

PETITIONER'S REPLY BRIEF

Preliminary Statement

Respondent, in relating its version of the facts, has studiously avoided the impelling force of evidence which establishes that the task of manually icing diners involves extreme exertion and the resulting inference that such extreme exertion also involves a likelihood of injury to employees. Respondent has likewise glossed over the vitally important and uncontradicted evidence that mechanical devices were readily available, which were both practical and in common use on tracks a few steps from where petitioner was injured, which would have eliminated the severe exertion required by the task (R. 39, 57).

Respondent has suggested that petitioner and his co-employees could have chosen the size of the pieces of ice

they carried to the tops of diners. This is true, but must be considered in the light of other testimony that the 100-pound cakes of ice were customarily carried by workmen because cakes of that size could be handled with less likelihood of them slipping from the shoulders of workmen and possibly injuring other workmen or passengers walking along the platform below, and in any event the number of trips up the ladder would be increased and exertion not decreased (R. 24, 41, 42).

Respondent has suggested that petitioner had adequate time to complete the task of icing the three diners before the end of his shift. The question of time is not of substantial importance. Petitioner could not have been expected to so space his trips up and down the ladder with 100-pound cakes of ice that he would finish precisely at quitting time. In any event the question is whether the work, performed in haste or otherwise, involved extreme exertion, and the many workmen who testified on behalf of petitioner stated without exception that it did involve extreme exertion (R. 43, 44, 45, 47). Whether or not such exertion also involved a likelihood of injury was clearly a jury question. It is a matter of universal knowledge that extreme exertion injures countless people under countless circumstances.

Duty and Breach of Duty

Petitioner's case was presented to the jury under the sole claim that respondent was negligent in furnishing insufficient equipment for icing diners with safety; that such equipment was readily available in the form of lifting devices so that coach cleaners would not be required to manually carry ice to the tops of diners and thereby subject themselves to the likelihood of overexertion. Yet respond-

ent continues to insist that the sole and only duty owed was not to negligently assign a workman, known to have a physical weakness, to manually carry ice up the ladders, and the Supreme Court of the State of Utah has found favor with this contention.

It is probably true that the first workman from any group who suffers injury from overexertion will invariably be the one who has a known or unknown physical weakness. Respondent argues that such physical weakness is a shield to protect railroads from liability to an injured workman even though an assigned task involves unusual forms of exertion and even though practical equipment is readily available to eliminate such exertion from the task.

We submit that the duty owed by respondent was a broad duty, not just to those known to be physically handicapped, but to each and every member of the class of workmen performing the task of icing diners. It was owed to the strong, the weak, the old and the young alike. Its violation would depend on whether there was a foreseeable likelihood of injury to any member of the class from insufficiency of equipment, not just to petitioner and not just to "normal" or "ordinary"' members of the class which respondent regards as persons in perfect health. The question is not whether petitioner was "normal," but whether the assigned task of icing diners manually was unsafe.

Conditions of safety and unsafety are relative in nature and varying in degree. Unless a condition is in the area where reasonable minds cannot differ, questions of safety and unsafety are peculiarly for the jury. Eight jurors, with the trial court's approval, have already registered an opinion that icing diners by hand under the circumstances of this case involves likelihood of injury from overexertion.

The Supreme Court of the State of Utah has held as a matter of law that there was no likelihood of such injury. This extraordinary decision has been rendered in the teeth of evidence that icing three diners was extremely tiring; that one normal workman, who was of slight build, was physically incapable of icing three diners; that said task involved more extreme physical exertion than pitching hay, digging a trench, or hauling cement in a wheelbarrow; that it was the one task involving more extreme physical exertion than any other task performed in The Ogden Union Railway and Depot Company yards, and that such task had been performed daily by countless workmen over the years and that the overexertion required by insufficient equipment did in fact cause the injuries to plaintiff (R. 13, 43, 44, 45, 47).

This decision, if allowed to stand, will withdraw the right of trial by jury from a substantial number of workmen injured in the performance of tasks requiring unusual forms of overexertion and overstraining. In fact, it is difficult to conceive of a case of overexertion or overstraining injury where recovery would not be defeated by the principles the Utah Supreme Court has pronounced.

Respondent has undertaken to distinguish the case of *Stewart v. Baltimore & Ohio R. Co.*, 137 F. 2d 527, with the following statement: "The likelihood of injury to some employee in normal health who undertook the operation of such a switch was apparent. Accordingly, the case was for the jury." (p. 17). In the *Stewart* case there was evidence that a switch was stiff and difficult to throw. In this case there was evidence that icing diners manually was a strenuous task. In both cases, the likelihood of injury from overextertion was only present as a permissive inference. Stewart was not "normal" in the sense that he was a perfect specimen of manhood. His heart was af-

flicted with certain frailties and weaknesses. He succumbed to a coronary thrombosis. This would not have occurred had he been possessed of a perfect heart. If he had possessed a perfect heart but a weak abdominal wall, he may well have suffered a hernia. Would his case then have been any less meritorious? Is there any way to determine from a group of workmen which individual will be the first to succumb to a task involving extreme exertion, or which portion of his anatomy will be the first to give way? Frequently overstraining or overexertion is the very thing which makes a weakness manifest. Should this fact alter the character of a railroad's duty? We reaffirm that the *Stewart* case is indistinguishable either on fact or principle.

Many types of appliances and equipment have been devised and placed in common use for the purpose of hoisting and lifting. These devices have eliminated countless tasks involving extreme forms of physical exertion. 45 U.S.C.A., Section 51 expressly recognizes the carrier's duty to eliminate extreme forms of physical exertion by the furnishing of *sufficient* appliances and equipment. The Supreme Court of Utah has nevertheless held as a matter of law that respondent owed no such duty; that no such duty was breached, and that no injury was caused in whole or in part by respondent's negligent omission.

This decision has emasculated from the Federal Employers' Liability Act any meaning in the words "insufficiency, due to its negligence, in its * * * appliances, * * * or other equipment."

Petitioner's Right of Trial by Jury

The right of trial by jury has been declared many times to be "a basic and fundamental feature of our system of federal jurisprudence and is part and parcel of the remedy

afforded railroad workers under the Federal Employers' Liability Act." *Bailey v. Central Vt. Ry. Inc.*, 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444.

Respondent, in its brief, made the following statement concerning the subject of trial by jury (p. 19):

> "A decision by this Court, either agreeing with or disagreeing with such an appraisal of the evidence as has been made by the Supreme Court of Utah, would not materially affect the principles of the right to trail by jury."

But mere declarations of principle do not guarantee this right to the injured employee. Where doubtful questions of fact are taken from the jury by a hostile court the use of lofty language does not alter the fact that the right of trial by jury has been denied an American citizen. Of what use are principles unless they are upheld by the deeds of our courts?

Mr. Justice Douglas in his concurring opinion in the case of *Wilkerson v. McCarthy et al.*, 336 U.S. 53, 69 S.Ct. 413, 420, speaking of this Court's function in overturning decisions where doubtful questions of facts have been taken from the jury and resolved by lesser courts in favor of the employer, had this to say:

> "* * * Since the condition was one created by the Court and beyond effective control by Congress, it was appropriate and fitting that the Court correct it. *In fact, a decision not to correct it was to let the administration of this law be governed not by the aim of the legislation to safeguard employees but by a hostile philosophy that permeated its interpretation.*"

In the case at bar the Utah Supreme Court has again rendered lip service to the principles contained in con-

trolling decisions of this Court, but its decision has cast railroad employees' right of trial by jury into doubt and has renderd this Court's great pronouncements "as sounding brass, or a tinkling cymbal." Yet respondent would say that no important constitutional question is involved.

Cause in Whole or in Part

Respondent has suggested petitioner's contention that this Court should pronounce definite rules on the question of cause in whole or in part is without merit inasmuch as the question of causation has never been an issue. This argument is interesting in the light of respondent's statement in its brief (p. 5):

> "* * * this had happened solely because his heart was in a weakened condition when he commenced the work."

The Supreme Court of the State of Utah in its opinion stated:

> "It must be conceded that without the rheumatic heart, injury would not have resulted."

Respondent at one stage seems to argue that overexertion was not a cause in whole or in part of petitioner's injury, and then to argue that causation is not an issue in the case. Petitioner has consistently contended that no serious question of causation exists in view of Dr. J. G. Olson's convincing testimony that petitioner's heart failure was precipitated by "unusual and severe exertion" while manually icing diners (R. 30, 32). This contention has consistently been denied by respondent.

It has seemed to petitioner that in fairness to this Court he should meet fairly and squarely each and every issue concerning whether the jury was the proper tribunal to determine petitioner's right of recovery. Petitioner has in good faith undertaken to meet those issues and here reaffirms its position that this case affords an opportunity to establish a rule of causation under the Federal Employers' Liability Act, setting at rest speculation and conjecture as to the meaning of the words "cause in whole or in part" as used in the Federal Employers' Liability Act.

Respectfully submitted,

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